

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 JAMES A. BATTLE, Jr.,) CASE NO. C05-1541-JLR-MAT
07 Petitioner,)
08 v.)
09 KENNETH QUINN, Superintendent, et al.,) REPORT AND RECOMMENDATION
10 Respondents.)

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INTRODUCTION AND SUMMARY CONCLUSION

Petitioner James A. Battle, Jr., proceeding *pro se* in this 28 U.S.C. § 2254 action, challenges his 2002 conviction by guilty plea to criminal solicitation. (Dkt. 8.) Respondent submitted an answer, arguing that petitioner’s § 2254 motion should be dismissed with prejudice. (Dkt. 17.) Petitioner did not submit a reply to respondent’s answer. Having reviewed the record in its entirety, including the state court record, the Court recommends that the petition be dismissed without prejudice.

19 "An application for a writ of habeas corpus on behalf of a person in custody pursuant to
20 the judgment of a State court shall not be granted unless it appears that . . . the applicant has
21 exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To
22 exhaust state remedies, a petitioner must present each of his claims to the state's highest court.

01 *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1993).
02 A petitioner must “alert the state courts to the fact that he was asserting a claim under the United
03 States Constitution.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan v.*
04 *Henry*, 513 U.S. 364, 365-66 (1995)). “The mere similarity between a claim of state and federal
05 error is insufficient to establish exhaustion.” *Id.* (citing *Duncan*, 513 U.S. at 366). “Moreover,
06 general appeals to broad constitutional principles, such as due process, equal protection, and the
07 right to a fair trial, are insufficient to establish exhaustion.” *Id.* (citing *Gray v. Netherland*, 518
08 U.S. 152, 162-63 (1996)).

09 Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and
10 sentence in a criminal case may be filed more than a year after the judgment becomes final.
11 Additionally, if the state court expressly declined to consider the merits of a claim based on an
12 independent and adequate state procedural rule, or if an unexhausted claim would now be barred
13 from consideration by the state court based on such a rule, a petitioner must demonstrate a
14 fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented
15 compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v.*
16 *Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

17 In this case, petitioner filed a personal restraint petition in the Washington Court of
18 Appeals in 2005. (Dkt. 19, Ex. 3.) He raised the same claims in that petition as he does in this
19 Court, challenging: (1) his eligibility for a good time sentence reduction; and (2) the calculation
20 of his offender score. (*Id.* and Dkt. 8.) The Department of Corrections responded in state court
21 by asserting that petitioner was ineligible for the good time off reduction and that RCW 10.73.090
22 barred his offender score challenge. (Dkt. 19, Ex. 4.) In August 2005, the Washington Court of

01 Appeals stayed petitioner's petition pending resolution of another case in which that court was
02 considering a similar early release credit claim. (*Id.*, Ex. 5.) The court made no mention of
03 petitioner's offender score claim.

04 Respondent notes that petitioner's personal restraint petition remains stayed in the
05 Washington Court of Appeals. Respondent argues that this habeas petition should nonetheless
06 be denied with prejudice given that petitioner's first claim is a Washington State statutory claim
07 and does not present a federal constitutional issue, and because his second claim is procedurally
08 barred by RCW 10.73.090.

09 However, at this point, there is no state court ruling on either of petitioner's claims.
10 Accordingly, the Court finds both petitioner's petition and respondent's arguments premature. For
11 this reason, petitioner's habeas petition should be denied and this action dismissed without
12 prejudice. A proposed Order of Dismissal Without Prejudice accompanies this Report and
13 Recommendation.

14 DATED this 24th day of April, 2006.

15 
16 Mary Alice Theiler
United States Magistrate Judge

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